United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

36-5

284

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,962

UNITED STATES OF AMERICA,

Appellee

v.

WARDELL D. CRAVEN,

Appellant

Appeal from the United States District Court
for the District of Columbia

Armin U. Kuder
Kuder, Sherman, Fox & Meehan
2000 K Street, N. W.
Washington, D. C. 20006
337-3121
Counsel for Appellant
(Appointed by this Court)

May 14, 1971

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

(Continued)

Cases: Page

Miscellaneous:

---

* Cases chiefly relied upon by appellant.

STATEMENT OF ISSUES PRESENTED

The issues presented for review are:

1. Whether it was error for the trial court to give a "missing witness" instruction over the objection of the defendant in a case where there was no prior showing that the missing witnesses were peculiarly available to the defendant and where under the circumstances, the witnesses would be unlikely to support defendant if his testimony were correct.

2. Whether the defendant was deprived of his constitutional right to the effective assistance of counsel under all of the circumstances, including the failure of defense counsel to object to the trial judge's reporting to the jury a theory of defense completely inconsistent with the defendant's testimony and the calling of a witness who did little but refute the deferdant's own testimony on critical matters.

This case has not previously been before this Court.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,962

UNITED STATES OF AMERICA,

Appellee

v.

WARDELL D. CRAVEN,

Appellant

BRIEF FOR APPELLANT

On Appeal from the United States District Court
for the District of Columbia

JURISDICTIONAL STATEMENT

This Court has jurisdiction of this appeal by virtue of the Act of June 25, 1948, c. 646, 62 Stat. 929, as amended, 28 U.S.C. Sec. 1291, and the Federal Rules of Appellate Procedure.

REFERENCES TO PARTIES AND RULINGS

Appellant presents for review, inter alia, the

oral ruling of the United States District Judge William B. Jones on August 19, 1970, reported at pages 140-141 and 159 of the reporters' transcript of proceedings (hereinafter cited as "Tr.").

There are no parties whose identity is not revealed by the caption on appeal.

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from a conviction in the United States District Court, after a jury trial, of assault with intent to kill while armed (D.C. Code, §§22-501 and 22-3202 (1967)) and carrying a dangerous weapon (D.C. Code, §22-3204 (1967)). The appeal challenges a "missing witness" instruction given to the jury and the effectiveness of the defendant's trial counsel.

B. Proceedings and Disposition Below.

Following a shooting incident at a party in the District of Columbia, appellant Wardell D. Craven was indicted in a four-count indictment charging assult with intent to kill while armed (D.C. Code, §§22-501 and 22-3202 (1967)), assault with intent to kill (D.C. Code, §22-501 (1967)), assault with a dangerous weapon (D.C. Code, §22-502 (1967)), and carrying a dangerous weapon

(D.C. Code, §22-3204 (1967)). The cause was heard on August 18 and August 19, 1970, before The Honorable William B. Jones, United States District Judge, and a jury. After hearing the testimony of six witnesses called by the Government and three by the defense, including the defendant, the jury returned a verdict of guilty on counts one (assault with intent to kill while armed) and four (carrying a dangerous weapon).[1/] Defendant was sentenced to a term of five years to fifteen years imprisonment on the first count, and one year on the fourth, the sentences to run concurrently. (Sentence and Committment, Dated December 21, 1970). Defendant had no prior record (Tr. 175). A timely Notice of Appeal was filed on December 31, 1970. The trial court continued defendant's release on personal bond pending sentencing (Tr. 175) and he continues to be under personal bond pending resolution of this appeal.[2/]

C. Facts Relevant to the Issues.

The testimony at trial was undisputed that on the night of February 27-28, 1970, there was a party at

---

1/ The jury was instructed not to consider counts two and three if it found defendant guilty under count one (Tr. 169-170).

2/ But see the Government's Motion to Revoke Bond Pending Appeal served May 11, 1971, in the District Court, citing the new District of Columbia Court Reform Act, P.L. 91-358, §23-1325 (1971).

the home of the complaining witness, Mr. Ira Seales (Tr. 3, 117). The defendant was invited but arrived late with two persons not invited except by him (Tr. 4, 119). He knew Mrs. Seales and another guest, but not Mr. Seales (Tr. 35, 121, 128). An altercation ensued involving Mr. Seales and the defendant, but the testimony of the witnesses was confused as to what happened.

The defendant and Mrs. Seales agreed that she greeted him as he entered the party (Tr. 35, 118). Mr. Seales testified to the contrary (Tr. 5, 25), and claimed that he soon was struck on the side of the head by the defendant (Tr. 5). The defendant testified that Mr. Seales struck him first, apparently because of Mrs. Seales' greeting him (Tr. 118), and another participant, Mrs. Brandon, saw the incident the same way (Tr. 105). There was no other evidence as to the existence of any animosity between the two men. All of the witnesses agreed that shortly after this, defendant and his two companions left the party (Tr. 6, 37, 75, 105, 118-119).

Approximately thirty minutes later (Tr. 13, 63), there was a knock on the rear door at the Seales' home, and when Mr. Seales went to the door, he was shot at least two times by one of three persons who were outside (Tr. 7-8). The three persons fled (Tr. 7) and the police responded to

a call (Tr. 55-56).

Still later, the police called defendant's home, told his wife that the defendant was suspected of shooting someone, and asked her to tell him to come to the station (Tr. 88). Defendant voluntarily complied, and upon arriving at the station, he denied any knowledge of the shooting incident (Tr. 120). There is no indication in the record that defendant has ever admitted to the crime.

In its case in chief, the Government presented three witnesses from the party and Mr. Seales who said that the defendant had been the man outside the back door who did the shooting (Tr. 6, 37, 64, 83).[3/] The Government did not call Mrs. Brandon, who invited the defendant to the party. The responding police officer testified and was permitted to report that it was defendant who did the shooting, on the basis of hearsay (Tr. 56).

Apart from the Government's case, the defendant's problems were increased immeasurably when during the case in reply, his counsel called Mrs. Brandon. This witness had only one thing to say about the shooting scene: defense counsel elicited that she saw the defendant running from the

---

3/ Although one witness, Mr. Austin, testified that Mrs. Seales, who had been very positive in her testimony (Tr. 37), was not even in the house at the time (Tr. 83). There were other startling inconsistencies.

back door immediately after the shooting (Tr. 108). The fact that she corroborated in some small details the version of the altercation later given by defendant (Tr. 105), scarcely kept the prosecuting attorney from cross-examining Mrs. Brandon at length on her implicating the defendant (Tr. 112-114).

Mrs. Craven, wife of the defendant, testified that he owned no gun but otherwise had no knowledge of the incident.

The defendant testified last. Although his version of the incidents at the party when he arrived had more support than Mr. Seales' from the other witnesses, including Mrs. Seales, his testimony as to his conduct after the altercation was at variance from the only other witness with knowledge called by his counsel, i.e., Mrs. Brandon. The defendant testified that he left after the party, separated from Mrs. Brandon and the other two companions and he went home by bus across town to North-east Washington (Tr. 119, 126-127). He heard no shots (Tr. 128).

Despite the defendant's unequivocal testimony, his own counsel did not present the case in this fashion, and did not contest the trial court's understanding that the defense was "mistaken identity", defined as a matter

of which "one" of the three men, including the defendant, "did the shooting" (Tr. 141, 167, 169). Much of the cross-examination of the eye witnesses to the shooting related to this same theory of defense, that is, the witnesses were asked if the defendant and his two companions looked alike, whether they could be distinguished, and it was implied that any one of them might have shot at Mr. Seales. (E.g., Tr. 13, 20, 45-46, 51-52, 69-72, 80-81.)

In instructing the jury, the trial judge again referred to the defense "that he did not carry a gun, he did not shoot the gun" (Tr. 169). There was no reference to the testimony in which defendant claimed he was not even present, but defense counsel raised no objection. The court charged the jury, inter alia, that even if the defendant had not actually fired the gun, if he aided and abetted the individual who did, he was just as responsible (Tr. 169).

The court also granted the Government's request for a "missing witness" instruction (Tr. 140-141). The witnesses about whom the jury was permitted to infer that their testimony would have been adverse to defendant were the two companions of defendant at the party, identified as having appeared at the rear door of the Seales' home as well. No one knew their names. They had been introduced

as "cousins" of the defendant in the hope it would make them acceptable guests (Tr. 106, 119) but they were not related to the defendant. He had only seen them once in several years since moving to his home in Northeast, and, that was on the night in question (Tr. 119). The defendant was cross-examined to some extent as to his knowledge of these two individuals known to him only as "Willie" and "Bubbles" (Tr. 123-125, 128). He said they had been "neighbors", that he had checked and they no longer resided at the addresses known to him. The prosecuting attorney implied in his questioning (without objection) that the witnesses should be at trial to testify for the defendant (Tr. 124. See also, 140), but defendant iterated that he had tried but could not find the alleged witnesses (Tr. 124-125). It was on the basis of this testimony only that the trial court permitted an inference to be drawn against defendant in its instructions to the jury.

Except for the minor altercation, there was no testimony of any motive for defendant to shoot Mr. Seales thirty minutes after defendant left the party. There was no testimony that defendant owned a gun, or that he was a violent man.

On the basis of the foregoing, the jury found defendant guilty of the maximum charges it was permitted to consider.

SUMMARY OF THE ARGUMENT

I

At the request of the Government, the trial court approved a "missing witness" instruction permitting the Government to ask the jury to draw an inference adverse to the defendant from the absence of two alleged accomplices. It is well established that such an instruction and inference is permissible only when the witness is peculiarly available to the defendant. The only testimony on this point established that the defendant had tried but could not find the witnesses and that the Government wanted to, but could not find them. Thus, they were equally unavailable to both parties. In addition, on the basis of the testimony of record, one would have to expect the missing witnesses to confess to crimes to support defendant, making them unavailable to him as a practical matter. On these facts, the instruction and inference were reversible errors.

II

Defendant had a right to the effective assistance of counsel. His defense was that he knew nothing of the shooting incident. But his counsel ignored this position of the defendant, called a damaging witness to contradict him, permitted the court to tell the jury that the defense

rather was which of three individuals, including defendant, did the shooting, did not object to hearsay identification of the defendant as the assailant, and otherwise did not present the defense so as to permit the conviction that defendant's case was fairly heard and understood by the jury.

ARGUMENT

I

THE COURT ERRED IN GIVING A "MISSING WITNESS" INSTRUCTION WHEN THERE WAS NO EVIDENCE THAT THE WITNESSES WERE AVAILABLE TO THE DEFENDANT, OR OTHERWISE COULD BE EXPECTED TO SUPPORT HIM.

The Government sought, and the trial court granted, a "missing witness" instruction[4/] over the objection of counsel for the defendant (Tr. 140-141). This instruction related to two witnesses, identified only as "Willie" and "Bubbles". The defendant admitted these men accompanied him to the party which it was alleged led to the shooting incident involved in the trial (Tr. 4-5, 119). Although some of the witnesses referred to these two individuals as cousins of the defendant (Tr. 106), the defendant testified that they were only rather distant friends of his (Tr. 119). This was corroborated by

---

4/ The form instruction as given by the trial court was:

> "If a witness who could have given material testimony on an issue in this case was peculiarly available to one party was not called by that party and his absence has not been sufficiently accounted for, or explained, then you may, if you deem it appropriate, to (sic) infer that the testimony of the witness would have been unfavorable to the party who failed to call him."

Tr. 159; See Criminal Jury Instructions for the District of Columbia, p. 9 (1966).

the testimony of the complaining witness, Mr. Seales (Tr. 5). In agreeing to give the Government's requested instruction that an inference could be drawn against the defendant for not calling these two witnesses, the trial court transgressed boundaries laid down by this Court in a number of instances.

A. There was no Required Showing that the Witnesses Were Physically Available to be Called by the Defendant.

The applicable standards for giving the "missing witness" instruction have been stated frequently by this Court and are succinctly summarized in Wynn v. United States, 130 U.S. App. D.C. 60, 64-65, 397 F.2d 621, 625 (1967), as follows:

> "We have frequently reiterated the principle that a party's failure to utilize a witness peculiarly within his power to produce . . . whose testimony would elucidate the transaction permits an inference that the testimony would have been unfavorable. But we have carefully restricted application of this rule to situations where it is peculiarly within the party's power to produce the witness and where, as well, the witness' testimony would elucidate the transaction. And we have outlawed both comment and instruction as to absent witnesses where either of these conditions was lacking." (Numerous citations omitted.)

There is no evidence below that Willie and Bubbles were "particularly within the [defendant's] power to produce". He testified on direct that he had not

"seen them since I moved off Fourteenth Street a couple years ago" (Tr. 119). On cross-examination, he testified as follows:

> Q. So you knew where they lived?
>
> A. Well, I used to know where they lived. I have been back around there several times looking for them, but they are not there anymore. (Tr. 123-124)

And under still further cross-examination on this point, with the prosecuting attorney inferring that the witnesses should be in court, defendant testified as follows:

> Q. And now are they here today to testify?
>
> A. Are they here? No, I haven't seen them.
>
> Q. And have you tried . . .
>
> A. I heard one of them was in jail for robbing a Safeway store.
>
> Q. Have you tried to locate them?
>
> A. I tried to locate both of them. Just like I said, I heard that one of them was in jail and I don't know where the other one is. (Tr. 124-125)

When asked to rule on whether or not it would give the "missing witness" instruction, the trial court developed no additional facts concerning the defendant's knowledge as to the whereabouts of Willie and Bubbles (Tr. 140).

Of course, the Government stated that it had "no idea" where the witnesses might be.

It has been expressly held that where a witness is equally unavailable to the two parties, no inference can be drawn from the absence of the witness. Brown v. United States, 134 U.S. App. D.C. 269, 414 F.2d 1165 (1969); Billeci v. United States, 87 U.S. App. D.C. 274, 278-279, 184 F.2d 394, 398-399 (1950); and Cf., Gass v. United States, 135 U.S. App. D.C. 11, 18-19, 416 F.2d 767, 775-776 (1969).

Here, the trial court pointed to the fact that the defendant understood that one of the witnesses was in jail. He then suggested that the man could have been brought from jail (Tr. 141). Certainly, such a witness, in such a place, would have been as equally available to the Government as to the defendant. There was no dispute that the whereabouts of the other witness was unknown to both. Under these circumstances, as held in the foregoing cases, it was improper to permit the jury to draw any inference as to the absence of the witnesses. The objection of defense counsel should have been sustained.

B. The Fact that the Missing Witnesses Could have been Charged with the Crime, Makes them Unavailable to Defendant as a Practical Matter.

In addition to physical unavailability of the witness, the courts have recognized that a witness may be unavailable to one party or the other because of his

role or personal interest in the case. Thus, a government employee associated with the prosecution cannot be considered someone available to the defendant. United States v. Jackson, 257 F.2d 41 (3rd Cir. 1958); see Richards v. United States, 107 U.S. App. D.C. 197, 275 F.2d 655 (1960).

In order for the court to give the instruction on the missing witness, the facts of the case must be such that the witness could reasonably be expected to support the defendant if the defendant's story were true. In other words,

> ". . . Where it cannot reasonably be supposed or inferred that the missing witness would have supported the defendant's account, even if true, we do not think there is any ligitimate basis for comment on defendant's failure to call the missing witness."

Pennewell v. United States, 122 U.S. App. D.C. 60, 61, 353 F.2d 870, 871 (1968).

Nearly all of the testimony below was that the two witnesses were participants in the shooting of Mr. Seales. The prosecuting attorney stated "[I]f we got them, we'd like to charge them with this crime." (Tr. 140) Under the test of the Pennewell case, supra, these witnesses certainly were not available "practically as well as physically." See Stewart v. United States, 135 U.S. App. D.C. 274, 418 F.2d 1110, 1115 (1969).

This Court has expressed the concern that a jury "lacking direction" might improperly draw an inference adverse to a defendant from the absence of persons not meeting the test for the missing witness instruction. Wynn v. United States, 130 U.S. App. D.C., at 65, 397 F.2d, at 626. If it is error to give no direction, it manifestly is prejudicial error to advise the jury that it may draw an inference where none is appropriate.

II

DEFENDANT LACKED EFFECTIVE ASSISTANCE OF COUNSEL UNDER ALL OF THE CIRCUMSTANCES.

Although trial counsel for the defendant did far from a perfunctory job during the course of the trial, the manner in which he conducted the defense was so confused and harmful to the position taken by the defendant, himself, as to be grounds for reversal.

A. There is a Constitutional Right to Effective Assistance of Counsel.

The Sixth Amendment to the United States Constitution grants defendant the right to counsel, and it is well settled that this right includes the right to "effective assistance of competent counsel." McMann v. Richardson, 397 U.S. 759, 773 (1970) at n. 14, and cases cited therein.

On appeal, this Court has reversed convictions because of ineffective assistance of counsel for the defendant at the trial. United States v. Hammonds, ____ U.S.

App. D.C. ____, 425 F.2d 597 (1970); Dyer v. United States, 122 U.S. App. D.C. 3, 379 F.2d 89 (1967); Clark v. United States, 104 U.S. App. D.C. 27, 259 F.2d 184 (1958). And in some instances, it is felt that a further investigation by the trial court was required. United States v. Weaver, 137 U.S. App. D.C. 274, 422 F.2d 711 (1970).[5/]

In order to consider a claim of ineffective assistance of counsel, it is necessary to "look to the entire record." Harried v. United States, 128 U.S. App. D.C. 330, 389 F.2d 281, 285 (1967). It is necessary to look to the "totality of the omissions and errors." United States v. Hammonds, supra, 425 F.2d, at 604.

B. The Defense was Extremely Prejudicial to the Defendant.

At the trial, defendant testified that he went to a party at the home of Mr. Seales with two individuals he introduced as "cousins" so they might be accepted. After an altercation with Mr. Seales, about which the testimony of the witnesses was quite contradictory, all agreed that the defendant left with the two other individuals by

---

5/ Reversals for ineffective assistance of counsel are not confined to this jurisdiction. E.g., Caraway v. Beto, 421 F.2d 636 (5th Cir. 1970).

the front door of the apartment. The defendant testified that after a brief conversation with one of the witnesses, Mrs. Brandon, who had been responsible for his invitation to the party, and the two other individuals, that they parted company. He then returned to his home via public transportation. He denied that he went to the back door of the apartment, that he had a gun, that he shot Mr. Seales, or that he even heard the shots, which all stated happened thirty minutes later. There was no evidence of any other animosity between Mr. Seales and the defendant, nor was the defendant (who had no record) said to be a violent man.

Of course, defendant's counsel permitted his testimony, and claimed no surprise at it. Yet, except for the appearance of the defendant on the witness stand, his version of his conduct was completely ignored and contradicted by his own counsel in his actions.

Thus, toward the end of the first day of the trial, defense counsel reported to the court that he did not want to call the defendant, but wanted to call another witness, Mrs. Brandon, who would not be available until the next day. Although this might be questionable tactics,[6/]

6/ A jury might question the testimony of the defendant agreeing with witnesses he has heard testify already.

in this instance, it was worse. It later appeared that counsel for the defendant knew that Mrs. Brandon's testimony could only be harmful on the basic issues of the trial (Tr. 100). She was called to support his version of the altercation in the apartment, thirty minutes before the shooting. With respect to the shooting, itself, however, counsel for the defendant elicited from Mrs. Brandon the testimony that she saw the defendant run from the back of Mr. Seales' house almost immediately after the shooting. Such testimony obviously was extremely damaging. To come from the defendant's own witness, while being examined by his attorney, could only be fatal. And having elicited the testimony himself, counsel could not even cross-examine on the matter.

Then, in discussing instructions and the respective theories with the trial judge and the prosecuting attorney, the following colloquy took place:

> MR. GILL: Your Honor, the Defense's tactic on cross-examination seemed to be to try to get the Government witnesses to show that they could not distinguish between the men and I anticipate a possible argument that one of the other, not Mr. Craven, did the shooting; therefore, I would like an aiding and abetting instruction.
>
> THE COURT: All right, aiding and abetting is proper here.

DEFENSE COUNSEL: Yes. (Tr. 140-141)

The trial judge then charged the jury in exactly these terms:

> "In this case, ladies and gentlemen, the Defendant does not say that Mr. Seales wasn't shot, he recognizes that, but he says that he was not the one who did the shooting. He also says that he was not the one who carried the gun." (Tr. 167)

> "Thus while the Defendant asserts the mistaken identity defense, that is, that he did not carry a gun, he did not shoot the gun and committed (sic) the assault . . . " (Tr. 169)

The clear meaning of these passages is that the court interpreted to the jury that the defense was that the defendant was one of the three persons who approached the rear door of Mr. Seales' apartment, but it was one of the other men, not he, who had the gun and did the shooting. First, as the court correctly charged (Tr. 169), if this were the theory of the defense, it would be insufficient since the defendant could be an aider and abettor. But more important, permitting the trial judge to say these things to the jury without objection was, in effect, to say that the defendant's story that he never went around to the back door at all and never heard any shots, was a fabrication. It is difficult to imagine a more damaging way to have the defendant's case presented to the jury.

There were other, less important, deficiencies in the defense. At one point, a police officer was permitted to identify the defendant as the person who had shot Mr. Seales on the basis only of hearsay, without objection by counsel (Tr. 56). The Government was permitted to put in evidence that a number of witnesses identified the defendant as the assailant at a line-up (Tr. 59-60). In fact, the testimony of the witnesses was that they recognized the defendant from prior acquaintanceship with him or had seen him at the party, rather than at the back door at the time of the shooting (Tr. 39, 72, 82). Of course, these are small points, but taken together with the calling of the very harmful witness, Mrs. Brandon, and permitting the court to completely undermine the testimony of the defendant in its instructions to the jury, there is little room for doubt that the defendant's story as to his conduct on the night of the shooting of Mr. Seales was never argued to or permitted to be considered by the jury in a meaningful way.

From the vantage point of this appeal, it is difficult to do more than "speculate concerning the effect upon the jury" of the references by the trial judge to a theory of defense totally inconsistent with the defendant's own testimony, the admission of the hearsay identification,

and the calling of the witness who clearly put the defendant at the scene of the shooting and testified as to his flight. See Dyer v. United States, supra, 379 F.2d at 90. It is submitted, however, that it is not necessary to speculate whether these circumstances, viewed as a whole, were extremely prejudicial to the presentation of the defendant's testimony and defense. They were.[7/] Defendant's conviction without having his testimony property presented, should be reversed.

CONCLUSION

For the foregoing reasons, appellant respectfully requests that his conviction below be reversed.

Respectfully submitted,

[redacted]

ARMIN U. KUDER
Kuder, Sherman, Fox & Meehan
2000 K Street, N. W.
Washington, D. C. 20006
337-3121
Counsel for Appellant
(Appointed by this Court)

7/ The standard for review of the effectiveness of counsel is less stringent, than if this were a case of collateral attack. Bruce v. United States, 126 U.S. App. D.C. 336, 340, 379 F.2d 113, 117 (1967). Apparently, in an appeal, there need be less than a Constitutional deficiency for reversal. Scott v. United States, ____ U.S. App. D.C. ____, 427 F.2d 609 (1970).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was hand delivered to the office of the United States Attorney for the District of Columbia, United States Courthouse, Washington, D. C., this 14th day of May, 1971.

[redacted]

ARMIN U. KUDER

BRIEF AND APPENDIX FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,962

UNITED STATES OF AMERICA, APPELLEE

v.

WARDELL D. CRAVEN, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JOHN G. GILL, JR.,
JAMES A. ADAMS,
Assistant United States Attorneys.

Cr. No. 631-70

INDEX

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Whether the court exceeded its discretionary authority in giving the missing witness instruction when it found that appellant could have located material witnesses?

II. Whether the trial decisions made by defense counsel were so egregiously erroneous as to constitute gross professional incompetence and thereby deprive appellant of his right to the effective assistance of counsel?

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,962

UNITED STATES OF AMERICA, APPELLEE

v.

WARDELL D. CRAVEN, APPELLANT

Appeal from the United States District Court for the District of Columbia

---

BREIF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By an indictment filed April 13, 1970, appellant was charged with assault with intent to kill while armed [1] (count one), assault with intent to kill [2] (count two), assault with a dangerous weapon [3] (count three) and carrying a dangerous weapon [4] (count four). On August 18, 1970, a jury trial commenced before the Honor-

[1] 22 D.C. Code §§ 501 and 3202.

[2] 22 D.C. Code § 501.

[3] 22 D.C. Code § 502.

[4] 22 D.C. Code § 3204.

able William B. Jones, and on August 19 the jury returned a verdict of guilty of assault with intent to kill while armed and carrying a dangerous weapon. Appellant was sentenced on December 21, 1970, to imprisonment for five to fifteen years on count one and one year on count four, the sentences to run concurrently. This appeal followed.

The Government presented the victim and three eyewitnesses to the assault who testified, with minor variations, that on the evening of February 27, 1970, a birthday party was given for Ira Seales, the victim, at his apartment at 2618 13th Street, N.W. (Tr. 2-3, 33-34, 62, 74, 101). At approximately 11:30 p.m. appellant arrived at the party with two uninvited young men. Appellant had been invited by Mrs. Julia Brandon, a friend and neighbor of Mrs. Seales, but was not acquainted with the other guests (Tr. 9, 39, 81-82). After noticing their presence, Mr. Seales asked appellant who his friends were and whether they had been invited to the party. Receiving no response to the second question, Seales asked appellant and his friends to leave. Appellant did not respond to the request, and it was accordingly renewed about five minutes later. After more delay, Seales attempted to escort the three men to the door. Appellant resisted and struck Seales on the head (Tr. 5, 46-47, 74-75). One of appellant's friends brandished a knife or a razor, but before the altercation could proceed further, Mrs. Brandon persuaded appellant to leave the apartment (Tr. 6, 18-19, 22, 37, 47, 53-54, 75).

Approximately one-half hour later Mr. Seales went into the kitchen to answer a knock on the back door, which led directly to an alley (Tr. 6, 13-14, 23-25, 37, 40, 63, 75). Both the kitchen and the rear area were well lit as Seales raised the shade to see who was at the door (Tr. 9, 15, 43-44, 71, 84). As he did so, two bullets tore into the door (Tr. 6, 14, 37, 48, 57, 64, 68, 76, 83). The door was knocked from its hinges as appellant and his two friends burst into the kitchen. Appellant then fired three more shots, wounding Seales in

the left knee and left hip (Tr. 6-8, 11, 37-38, 49, 52, 56, 64-65, 68, 76, 78, 83), before fleeing through the rear exit (Tr. 7). Mrs. Seales fell to the floor to assist her husband, severely injuring her hand on broken glass from the door, and then ran to Mrs. Brandon's apartment to call the police because the Seales household had no telephone (Tr. 38-39, 50-51).

Mrs. Seales and Mr. and Mrs. Alvin Austin were all present when the shooting occurred. Each of them was either in the kitchen, a small nine-foot by twelve-foot room, or had a direct view into the kitchen from the living room (Tr. 8, 17-18, 37, 48, 63, 67-68, 75). All three witnesses attended a lineup containing approximately ten persons on March 19, 1970. Each identified appellant at the lineup and at trial as the assailant who fired the shots wounding Mr. Seales (Tr. 40-41, 58-60, 68, 72-73, 78).

Defense counsel carefully cross-examined each Government witness to determine his individual sobriety and the general level of alcoholic consumption at the party (Tr. 11-12, 44-45, 47, 66, 79). Each was also questioned with respect to his recollection of the physical descriptions of appellant's friends and their clothing. Several witnesses remembered that appellant wore green pants (Tr. 13, 43, 63, 70, 80), that each of the three had bush haircuts (Tr. 43, 45, 80), that one had the same light complexion as appellant and that one was darker (Tr. 20-21, 45-46, 81). In addition, the three men were also relatively similar in height and weight (Tr. 13, 46, 72, 80-81). Both of appellant's companions were described as very young, either teenagers or in their early twenties (Tr. 13, 20, 37, 69).

After attempting at the bench to limit Government cross-examination of Mrs. Brandon, defense counsel called her to the stand. She testified that prior to appellant's arrival at the party, Mrs. Seales had told her that she and her husband had argued about a female friend of Mr. Seales (Tr. 103-104). Mrs. Brandon added

that there had been a considerable amount of drinking at the party (Tr. 114). According to Mrs Brandon, Mrs. Seales greeted appellant on his arrival by putting her arm around him, provoking Mr. Seales into striking him. Appellant did not retaliate, and Mrs. Brandon succeeded in convincing appellant and his companions to leave. Appellant then invited Mrs. Brandon to go downtown, but she declined (Tr. 105-106). She confirmed that each of appellant's companions, who she said were his cousins, was similar in size to appellant, that one was light and the other dark, and that each had a bush haircut (Tr. 106-107). Additionally she stated that one cousin was armed with a knife and the other with a gun (Tr. 106). Defense counsel also brought out that the witness saw appellant in the alley between her house and the Seales apartment building just after hearing shots (Tr. 108).

During cross-examination Mrs. Brandon testified that, once outside the Seales apartment, appellant asked if the Seales children were home. She told him they were not (Tr. 111) and returned to her home, where she immediately heard shots outside. She quickly went out the rear entrance of her apartment, which faced the alley in common with the Sealeses' rear door (Tr. 112-113). Emerging into the alley, she saw appellant and his cousins exiting from the Sealeses' building, almost knocking her down as they ran by. She asked appellant what had happened, but he said nothing and continued up the alley (Tr. 106, 113-114). Mrs. Brandon also stated that on occasion appellant had given her rides in an older green automobile with fishtails on the rear fenders (Tr. 109-110).

Appellant confirmed Mrs. Brandon's testimony concerning his arrival at the party and Mr. Seales' attack on him. He left the party, walked to Thirteenth and Euclid Streets with his friends (Tr. 127), and then walked either to Fourteenth and Clifton (Tr. 119) or to Fourteenth and Euclid (Tr. 127) to catch a bus home. Appellant also explained that the youths with him were not his cousins; he had only introduced them as cousins

to make them acceptable at the party (Tr. 119, 127). Appellant vaguely explained that they were friends whom he had not seen either for two years since he moved from the Fourteenth Street area (Tr. 119) or for seven years (Tr. 123). He stated he was driven to the party by a cousin in the same 1960 green Chrysler with fishtails on the rear fenders that appellant had previously used when going out with Mrs. Brandon (Tr. 122-123, 129). However, when describing his meeting with his long-lost friends, appellant stated that he "met them about Thirteenth Street and they walked me down to the party" (Tr. 119).

The Government then presented a rebuttal witness, Vernetta Craig, who was walking to the Seales party around midnight when she heard gunshots and soon thereafter saw three persons with bush cuts run out of the alley beside the Sealeses' apartment house (Tr. 132-133). She was not able to see them well enough to identify them (Tr. 135-137, 139), but one of the three drove away in an older green automobile which had fishtails (Tr. 134). The witness then saw another person (Mrs. Seales) leave the alley, bleeding, and run down the street (Tr. 137-138).

In discussing jury instructions with counsel, the court agreed to give the missing witness instruction [5] (Tr. 140-141) because the Government had not had an equal opportunity to produce the two "cousins" and because appellant was capable of producing the witnesses, one of whom he knew to be in jail for robbing a Safeway store. The court also agreed to give an instruction on aiding and abetting [6] (Tr. 141, 148) and an instruction on mistaken identity requested by defense counsel (Tr. 147-148).

---

[5] JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 15 (1966).

[6] *Id.*, No. 47.

ARGUMENT

I. Sufficient information was developed upon which the trial court could rationally decide to give the missing witness instruction.

(Tr. 106, 108, 119, 123-130)

Appellant argues that the two missing witness were not peculiarly available to either party because neither had located them. Additionally, he claims unavailability of the witnesses because he erroneously assumes that in order to support appellant's testimony the witnesses would have had to confess to a crime.

The two necessary bases for granting the missing witness instruction are peculiar availability of the witness to one party and the witness' possession of knowledge which will "elucidate the transaction."[7] This Court recently stated that, subject to certain guidelines, application of this standard is a matter within the discretion of the trial court:

> Notwithstanding the development of the [missing witness] rule in this and other courts in reliance upon *Graves* [v. *United States*, 150 U.S. 118 (1893)], the Supreme Court in that case did not deprive trial courts of considerable latitude in applying the rule, guided by the importance of the possible witness to a fair elucidation of the facts as well as by a rational interpretation of when a party has the power to produce him.[8]

---

[7] *Wynn* v. *United States*, 130 U.S. App. D.C. 60, 397 F.2d 621 (1967). The theory underlying the instruction is that "nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause." 2 WIGMORE, EVIDENCE § 285, at 162 (3d ed. 1940).

[8] *Burgess* v. *United States*, —— U.S. App. D.C. ——, ——, 440 F.2d 226, 233 (1970).

A. *Peculiar Availability*

Peculiar availability means more than mere physical amenability to subpoena. The concept connotes a special relationship between the party and the missing witness.[9] Further, disclosure of the names and whereabouts of potentially hostile witnesses creates no obligation to subpoena the missing witnesses.[10] In the case at bar, in any event, the Government never knew the names of the witnesses and did not learn until the trial that one was in prison (Tr. 140). Neither was in any realistic sense "available" to the Government.

Mrs. Brandon stated that the two missing witnesses were appellant's cousins (Tr. 106). At trial, however,

---

[9] *Id.* at ——, 440 F.2d at 232; *see United States* v. *Stevenson*, 138 U.S. App. D.C. 10, 424 F.2d 923 (1970); *Stewart* v. *United States*, 135 U.S. App. D.C. 274, 418 F.2d 1110 (1969); *Pennewell* v. *United States*, 122 U.S. App. D.C. 332, 353 F.2d 870 (1965); *Richards* v. *United States*, 107 U.S. App. D.C. 197, 200, 275 F.2d 655, 658 (Bazelon, J., dissenting), *cert. denied*, 363 U.S. 815 (1960); *Milton* v. *United States*, 71 App. D.C. 394, 110 F.2d 556 (1940); *Egan* v. *United States*, 52 App. D.C. 384, 287 F. 958 (1923). In *Burgess* the Court specifically noted that "[t]he testimony showed a relationship between the Government and the informer which placed it peculiarly within the power of the Government to produce him if we are to give any meaning to the idea expressed by the term 'peculiarly.'" —— U.S. App. D.C. at ——, 440 F.2d at 232. Similarly, Judge Bazelon in his dissenting opinion in *Richards* v. *United States*, *supra*, stated, "A majority of the Federal courts (which, in my opinion, includes this one), numerous commentators and I think that 'peculiarly available' means more than mere physical availability. Under the latter view, even if one side could obtain service of a subpoena upon a witness, he may still be said to be 'peculiarly available' to the other side where there is a likelihood of bias on the part of the witness in favor of the other side, or where, as here, there is a special relationship between the witness and the other side, such as kinship or employment." 107 U.S. App. D.C. at 202, 275 F.2d at 660.

[10] *United States* v. *Stevenson*, *supra* note 9. *Burgess* v. *United States*, *supra* note 9, went further and found that, though the Government had furnished defense counsel with information as to the location of the informant, the defense had no obligation to seek the witness by subpoena. —— U.S. App. D.C. at ——, 440 F.2d at 232, and concurring opinion, *id.* at —— n.3, 440 F.2d at 236 n.3.

appellant attempted to explain that they were introduced as his cousins only so that they would be accepted at the party (Tr. 119, 127). He also claimed that he had not seen them for either two years (Tr. 119) or seven years (Tr. 123). Since their ages were variously estimated as late teens or early twenties, appellant had not seen them since they were approximately ten to sixteen years old. Nevertheless, he was able to recognize them on the street at 11:00 p.m. and knew them well enough to invite them to a party. Appellant also testified that he looked for the witnesses where they used to live, and that although he was unable to locate them, he did discover that one was in prison for robbing a Safeway store (Tr. 124-125). Appellant's testimony indicating his familiarity with the two witnesses, as well as his knowledge of the area where they lived and could be found at the time of trial,[11] amply demonstrates that the

---

[11] Q. [By the prosecutor]: And you say you knew them when you lived on Fourteenth Street?
A. Yeah, that's been about seven years ago. (Tr. 123.)

* * * *

Q. And did you know them well at that time?
A. No, just as neighbors.
Q. Just as neighbors?
A. Yes.
Q. So you knew where they lived?
A. Well, I use to know where they lived. I have been back around there several times looking for them, but they are not there anymore.
Q. Now where did you meet them that night?
A. Where did I meet them?
Q. On the evening of the 27th?
A. We drove to 14th—13th Street on Euclid Street, they was walking. (Tr. 123-124.)

* * * *

Q. So you invited them to come along with you?
A. Yes.
Q. Even though you hadn't seen them for seven years?
A. Yeah, they were friends of mine. (Tr. 124.)

* * * *

Q. Did they come to the bus stop with you?
A. No, because they live in that area, they stay in that area and they're usually in that area. (Tr. 127.)

court properly exercised its discretion in determining that appellant could have located the missing witnesses.

Appellant also argues that although his testimony indicated that neither he nor his cousins participated in any crime, the jury should not be granted an opportunity to draw an adverse inference from their absence since the Government suspected their complicity. His reliance on *Pennewell* v. *United States, supra* note 9, is misplaced, however, because in that case both the Government and the defense theories indicated that the missing witness was a participant in the crime. *See also United States* v *Bradley*, 136 U.S. App. D.C. 339, 420 F.2d 181 (1969).

B. *Material Information*

The court must also determine whether it can reasonably be inferred that if produced the witnesses could elucidate the transaction and would support the presentation of one of the parties.[12] Appellant's defense included references to two other persons who could reasonably be expected to corroborate his story if it were true. Unquestionably the two missing witnesses possessed information crucial to appellant's defense. Appellant claimed to have walked with them from the Seales apartment to Thirteenth and Euclid Streets (Tr. 127). Meanwhile, Mrs. Brandon, who had left with appellant, walked around the block to her house and heard the shots as she was putting the key in the door (Tr. 108). Confirmation by the missing witnesses that they were

---

[12] *United States* v. *Stevenson, supra* note 9; *Stewart* v. *United States, supra* note 9; *Wynn* v. *United States, supra* note 7; *Pennewell* v. *United States, supra* note 9; *Richards* v. *United States, supra* note 9. In *Stevenson* the Court stated, "We decline also to extend the doctrine of *Brown* [v. *United States*, 134 U.S. App. D.C. 269, 414 F.2d 1165 (1969),] to any case in which the 'missing witness' would testify only on matters relating solely to an alibi or other defense wherein the alleged facts are solely in the possession of the defendant and are completely unknown to the Government." 138 U.S. App. D.C. at 14, 424 F.2d at 927.

with appellant walking to Thirteenth and Euclid would have been materially beneficial to his defense, would not have been cumulative and would have come from a superior source.[13]

It is evident, therefore, that sufficient facts were presented to the court for a rational determination that the witnesses were important to appellant's defense, that they possessed information that would elucidate the transaction and that they could have been produced by appellant. Failure to produce them amply justified the giving of the missing witness instruction.

II. The record does not support appellant's suggestion that defense counsel's conduct of the trial was so grossly incompetent that it blotted out the essence of a substantial defense.

(Tr. 6-9, 11-21, 23-26, 40-41, 44-54, 66-73, 78-84, 99-108, 114-115, 134-139, 150-171)

Appellant recognizes the extremely capable performance of his trial counsel. Nevertheless, he contends that the confusion emanating from the presentation of Mrs. Brandon as a defense witness and counsel's failure to object to the court's instructions relative to mistaken identity were errors so egregious that he is entitled to a reversal of his conviction on the ground of ineffective assistance of counsel. Effective assistance, however, while more than mere procedural formality, is not to be tested by the quality of the assistance or by whether or not it was successful. *Mitchell* v. *United States*, 104 U.S. App. D.C. 57, 259 F.2d 787, *cert. denied*, 358 U.S. 850 (1958). Appellant has the extremely heavy burden of demonstrating that defense counsel was so grossly incompetent that his actions "blotted out the essence of a substantial

---

[13] Although not discussed in the record, it appears that the instruction would have been equally applicable to the cousin who allegedly drove appellant to the party, and who could have clarified the meeting with the two friends and confirmed that appellant did not use the green 1960 Chrysler that night.

defense." *Bruce* v. *United States*, 126 U.S. App. D.C. 336, 379 F.2d 113 (1967); *see Scott* v. *United States*, 138 U.S. App. D.C. 339, 427 F.2d 609 (1970); *Harried* v. *United States*, 128 U.S. App. D.C. 330, 389 F.2d 281 (1967). It is not the function of an appellate court to make a retrospective evaluation of trial tactics from an uninvolved reading of the printed record. *United States* v. *Hammonds*, 138 U.S. App. D.C. 166, 425 F.2d 597 (1970); *Mitchell* v. *United States*, *supra*. Nor may the reviewing court determine whether another attorney, applying hindsight, would have conducted the trial differently, or even whether defense counsel made mistakes.[14] Rather, the question to be resolved is whether, on the basis of the entire record, defense counsel was so grossly incompetent that appellant was prevented from presenting a *substantial* defense and was thereby denied a fair trial.

In its case in chief the Government presented an extremely strong case: four eyewitnesses to the shooting identified appellant as the gunman.[15] Under the circumstances appellant's contrary account could not conceivably be considered a substantial defense.[16] Defense counsel was therefore forced to construct a defense based on circumstantial evidence drawn from the Government witnesses. Thus he attempted to show that they had done a considerable amount of drinking at the party and could easily have been mistaken as to the identity of the assailant. Further, he elicited several discrepancies among

---

[14] *Bruce* v. *United States*, *supra*; *Edwards* v. *United States*, 103 U.S. App. D.C. 152, 256 F.2d 707, *cert. denied*, 358 U.S. 847 (1958).

[15] Appellant's claim that he was picked out of the lineup from his earlier appearance at the party and not from identification at the Sealeses' rear door is completely erroneous (Br. 21). All the witnesses unequivocally stated that they picked appellant out of the lineup as the man whom they saw do the shooting (Tr. 40-41, 72-73, 78).

[16] Appellant does not now suggest any other effective defense that was not presented. He apparently believes that his unsupported story would have been a sufficient defense.

the stories of the witnesses in an effort to undermine their credibility. It was also necessary to present evidence which would in some manner establish the credibility of appellant. Counsel was thus faced with a dilemma whether to put on Mrs. Brandon, the only witness who would support appellant's story of the events at the party but who would also be cross-examined on appellants presence in the alley after the shooting, or to see her presented as a rebuttal witness who would immediately testify to her observation of appellant in the alley in any event. Defense counsel made a tactical decision and elected to call Mrs. Brandon himself in order to elicit the favorable testimony from her, then blunted the Government attack on the witness by also bringing out the adverse information she possessed.

The jury was instructed both on aiding and abetting and on mistaken identity. The specific instructions which appellant now challenges (see Appendix, *infra*, pp. 15-16) and the charge as a whole properly placed the burden of proof on the Government and did not in any way suggest to the jury that appellant had presented no defense upon which they could base a verdict of not guilty. Immediately prior to instructing the jury that the court's comments on the evidence, if any, were not binding on the jury, the court said:

> Thus while the Defendant asserts the mistaken identity defense, that is, that he did not carry a gun, he did not shoot the gun and committed [*sic*] the assault and while the Government has the burden of proving beyond a reasonable doubt his identity involved, you have also the right and you must take into consideration whether he was an aider and abettor of some person you might have found did the shooting. (Tr. 169.)

The case was neither long nor factually confusing; no prejudice could have resulted from the defense of mistaken identity or the instructions as given by the court.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JOHN G. GILL, JR.,
JAMES A. ADAMS,
Assistant United States Attorneys.

APPENDIX

APPENDIX

The court instructed the jury in pertinent part as follows:

> In this case, ladies and gentlemen, the Defendant does not say that Mr. Seales wasn't shot, he recognizes that, but he says that he was not the one that did the shooting. He also says that he was not the one who carried the gun. He says this is a case of mistaken identity. And in that connection you are instructed that the identity of the Defendant as the person who committed the crime is an element of every crime; therefore, the burden is on the Government to prove beyond a reasonable doubt, not only that the crime alleged was committed, but also that the Defendant was the one who committed it. In this regard, you are instructed that a defendant need not prove that another person, or persons, may have committed the crime, nor is the burden on the Defendant to prove his innocence. If the facts and circumstances that have been introduced into evidence raise a reasonable doubt as to whether the Defendant is the person who committed the crime charged, then you should find the Defendant not guilty of the offense.
>
> And in that connection, I also instruct you that you may find the Defendant guilty of the crimes charged in the indictment without finding that he personally committed each of the acts constituting the offenses, or that he was personally present at the commission of the offenses; for any person who advises, incites, or connives at an offense, or aids or abets the principal offender is punishable as a principal. That is, he is as guilty of the offense as if he had personally committed each of the acts constituting the offense. A person aids and abets an-

other in the commission of a crime if he knowingly associates himself in some way with the criminal venture, with the intent to commit the crime, participates in it as something he wishes to bring about, and seeks by some action of his to make it succeed. Some conduct by the Defendant of an affirmative character in furtherance of a common criminal design or purpose is necessary. Mere physical presence by the Defendant at the time and place of the commission of such offense is not by itself sufficient to establish his guilt. But it is not necessary that any specific time or mode of committing the offense shall have been advised or commanded, or that it shall have been committed in the particular way instigated or agreed upon. Nor is it necessary that there shall have been any direct communication between the actual perpetrator and the Defendant. (Tr. 167-169.)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 442405 143